JUAHIR SADIKON

v.

PERBADANAN KEMAJUAN EKONOMI NEGERI JOHOR

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA
DATO' ABDUL MALEK AHMAD JCA
DATUK MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: J-02-157-95]
4 JULY 1996

EVIDENCE: *Presumption - Evidence Act 1950, s. 114(g) - Onus of proving allegation - Allegation of oral representation - Adverse inference - Whether burden of proof shifted.*

CONTRACT: *Oral agreement - Variation of terms of written agreement - Oral representation - Whether there was a binding oral representation - Tenancy - Option to purchase property at end of tenancy.*

This was an appeal from the decision of the High Court in: (i) dismissing the appellant's claim for, *inter alia*, a declaration that he was entitled to purchase and the respondent was obligated to sell certain premises; and (ii) allowing the respondent's counter-claim for vacant possession, rental arrears, and mesne profits.

The dispute concerned one unit ('the disputed unit') of the 999 units of low-cost houses built by the respondent on a piece of land in Johor Bahru. The disputed unit had been rented out to the appellant for RM55 per month since 1977. The tenancy was for a term of three years with an option to the appellant to purchase the disputed unit. Such option was to be exercised by giving a three-month written notice.

The appellant exercised his option to purchase out of time. However, the respondent waived the breach and offered to sell the disputed unit to the appellant for RM14,000 on terms and conditions as found in the respondent's letter dated 12 October 1981.

The respondent's offer was rejected by the appellant and, when negotiations on the price failed, the respondent by a letter dated 19 November 1981 withdrew the offer. Two notices to quit were issued by the respondent, dated 31 December 1985 and 29 July 1986 respectively.

The appellant, however, refused to deliver vacant possession; instead, it commenced legal proceedings.

The main issue that fell for determination was whether one Tan Sri Dato' Basir Ismail ('the Tan Sri'), who was then a director of the respondent, had

in fact verbally promised on behalf of the respondent to sell the disputed unit to the appellant at between RM7,000 to RM8,000.

Corollarily, pursuant to the appellant's failure to secure the presence of the Tan Sri in Court to give testimony, an attempt was made by the appellant to raise the presumption under section 114(g) of the Evidence Act 1950 ('the Act') against the respondent. Thus, the issue arose as to whether such a presumption could be raised against the respondent.

The High Court answered in the negative and hence the instant appeal.

Held:

Per Siti Norma Yaakob JCA:

[1] A perusal of the notes of evidence confirmed the trial Judge's finding that there was no evidence to show that the Tan Sri had made any oral representation as to the purchase price of the disputed unit.

[2] He who alleges must prove the allegation. Thus, it was incumbent upon the appellant to produce the Tan Sri as a witness to prove the allegation. The fact that the appellant was unable to secure the attendance of the Tan Sri as a witness did not shift the burden to the respondent to produce the witness to testify as to what he had allegedly uttered; the respondent never raised such an allegation and had even denied making one. Hence, s. 114(g) of the Act could not be invoked against the respondent. In fact, it should be the reverse.

Per Abdul Malek Ahmad JCA:

[1] Their lordships were inclined to agree with the finding of the trial Judge that the relevant witness who was not called, namely the Tan Sri, had not made such a representation on the purchase price but had only promised to refer the matter to the respondent's board members before a firm offer could be made on the price.

[2] It was the appellant, under the rules of evidence, who should call the Tan Sri to prove its case and not hope for the respondent to do so. The appellant's failure to do so did not mean that the burden shifted to the respondent who was in fact denying the allegation. Section 114(g) of the Act could not be applied against the respondent under the circumstances. In fact, that very provision should apply against the appellant for failing to call the Tan Sri.

Per Mokhtar Sidin JCA:

[1] It was the appellant who had asserted that there was an offer to sell the disputed unit at a price between RM7,000 to RM8,000. The onus was, thus, on the appellant to satisfy the Court that there was in fact such an offer. The appellant had failed to produce the Tan Sri to tender evidence in support; thus, it had failed to discharge the onus.

[2] There was no justification for drawing an adverse inference against the respondent for not calling the Tan Sri as a witness. As it was the appellant's assertion that the Tan Sri was the one who had made the offer, it was, therefore, not in the interest of the respondent to call him.

[Appeal dismissed with costs. Judgment stayed pending appellant's application for leave to appeal to the Federal Court]

[Appeal from High Court Malaya, Johor Bahru; [1995] 2 CLJ 96]

*[**Bahasa Malaysia** Translation of Headnotes]*

***KETERANGAN**: Anggapan - Akta Keterangan 1950, s. 114(g) - Beban membuktikan pengataan - Pengataan mengenai representasi lisan - Inferens yang bertentangan - Samada beban membukti beralih.*

***KONTRAK**: Perjanjian lisan - Pengubahan terma-terma perjanjian bertulis - Representasi lisan - Samada wujudnya representasi lisan yang mengikat - Sewaan - Pilihan untuk membeli harta di penghujung tempoh sewaan.*

Ini adalah rayuan daripada keputusan Mahkamah Tinggi kerana (i) menolak tuntutan perayu untuk, antara lainnya, satu pengisytiharan bahawa beliau berhak untuk membeli dan responden pula bertanggungan untuk menjual premis-premis yang tertentu dan (ii) membenarkan tuntutan balas responden untuk mendapatkan milikan kosong, tunggakan-tunggakan sewa dan hasil perantaraan.

Pertikaian tersebut adalah berhubung dengan satu unit ('unit yang dipertikaikan') dari 999 unit rumah-rumah kos rendah yang dibina oleh responden di atas sebidang tanah di Johor Bahru yang telah disewakan kepada perayu bagi bayaran sebanyak RM55 sebulan sejak 1977. Tempoh sewaan adalah selama 3 tahun dengan opsyen atau pilihan untuk perayu membeli unit yang dipertikaikan itu. Opsyen yang sedemikian hendaklah dilaksanakan dengan memberikan notis bertulis selama 3 bulan.

Perayu telah melaksanakan opsyennya di luar masa yang dihadkan untuk membeli. Walaubagaimanapun, responden telah mengenepikan kemungkiran tersebut dan telah menawarkan penjualan unit yang dipertikaikan itu pada harga RM14,000 atas terma-terma dan syarat-syarat sepertimana yang terdapat dalam surat responden bertarikh 12 Oktober 1981.

Tawaran responden itu telah ditolak oleh perayu dan ketika perundingan berhubung dengan harga gagal, responden tersebut melalui surat bertarikh 19 November 1981 telah menarik balik tawaran tersebut. Dua notis keluar telah dikeluarkan oleh responden bertarikh 31 Disember 1985 dan 29 Julai 1986 masing-masingnya.

Perayu, namun begitu, enggan memberikan milikan kosong, sebaliknya, ianya, telah memulakan prosiding undang-undang.

Isu utama yang harus ditentukan adalah samada seseorang yang bernama Tan Sri Dato' Basir Ismail ('Tan Sri tersebut'), yang ketika itu merupakan pengarah responden, telah pada hakikatnya bagi pihak responden berjanji secara lisan untuk menjual unit yang dipertikaikan itu kepada perayu pada harga antara RM7,000 hingga RM8,000.

Ekoran itu, selaras dengan kegagalan perayu untuk memastikan kehadiran Tan Sri tersebut di Mahkamah untuk memberikan testimoni, satu percubaan telah dibuat oleh perayu untuk membangkitkan anggapan di bawah s. 114(g) Akta Keterangan 1950 ('Akta') terhadap responden. Dengan itu, isu telah berbangkit samada anggapan yang sedemikian boleh dibangkitkan terhadap responden.

Mahkamah Tinggi telah tidak menyetujui dan dengan itu menyebabkan rayuan semasa ini.

Diputuskan:

Oleh Siti Norma Yaakob HMR:

[1] Penelitian terhadap nota-nota keterangan mengesahkan keputusan perbicaraan bahawa tidak terdapat keterangan bagi menunjukkan bahawa Tan Sri tersebut telah membuat sebarang representasi lisan berhubung dengan harga belian unit yang dipertikaikan itu.

[2] Orang yang membuat pengataan mestilah membuktikan pengataan itu. Dengan itu, ianya wajib bagi perayu mengemukakan Tan Sri tersebut sebagai saksi bagi membuktikan pengataan tersebut. Hakikat bahawa perayu telah tidak berjaya mendapatkan kehadiran Tan Sri tersebut sebagai saksi tidak mengalihkan bebanan kepada responden untuk mengemukakan saksi tersebut bagi memberikan keterangan berhubung dengan apa yang dikatakan telah disebut oleh beliau; responden tidak pernah membangkitkan pengataan yang sedemikian dan malahan telah menafikannya. Dengan itu, s. 114(g) Akta tidak boleh digunakan terhadap responden. Malahan ianya harus dipakai sebaliknya.

Oleh Abdul Malik Ahmad HMR:

[1] Yang Arif Hakim-hakim cenderung untuk bersetuju dengan keputusan Hakim perbicaraan bahawa saksi yang relevan itu, yang tidak dipanggil, iaitu Tan Sri tersebut, telah tidak membuat satu representasi berhubung dengan harga belian tersebut tetapi telah hanya berjanji untuk merujukkan perkara tersebut kepada lembaga pengarah responden sebelum satu tawaran yang kukuh dapat dibuat ke atas harga tersebut.

[2] Ianya adalah perayu, menurut kaedah-kaedah keterangan, yang seharusnya memanggil atau menjemput Tan Sri tersebut untuk membuktikan kesnya dan bukan hanya mengharapkan supaya responden melakukannya.

Kegagalan perayu untuk melakukan sedemikian tidak bermakna bahawa beban tersebut telah beralih kepada responden yang pada hakikatnya menafikan pengataan tersebut. Seksyen 114(g) Akta tersebut tidak boleh dipakai terhadap responden di bawah keadaan yang sedemikian. Malahan pada hakikatnya, peruntukan berkenaan seharusnya terpakai terhadap perayu kerana gagal untuk memanggil atau menjemput Tan Sri tersebut.

Oleh Mokhtar Sidin HMR:

[1] Ianya adalah perayu yang telah menegaskan bahawa terdapatnya tawaran untuk menjual unit yang dipertikaikan itu pada harga antara RM7,000 hingga RM8,000. Bebanan adalah, dengan itu, terletak pada perayu untuk menyakinkan Mahkamah bahawa pada hakikatnya terdapat tawaran yang sedemikian. Perayu telah gagal untuk mengemukakan Tan Sri tersebut bagi memberikan keterangan sokongan; dengan itu, ianya telah gagal untuk melepaskan bebanan tersebut.

[2] Tidak terdapat kewajaran bagi menyebabkan satu inferens yang bertentangan terhadap responden kerana tidak memanggil atau menjemput Tan Sri tersebut sebagai seorang saksi. Oleh kerana ianya merupakan penegasan perayu bahawa Tan Sri tersebut telah membuat tawaran itu, ianya adalah, dengan itu, bukan merupakan kepentingan responden untuk memanggil atau menjemput beliau.

[Rayuan telah ditolak dengan kos. Penghakiman digantung sementara menantikan permohonan perayu untuk kebenaran bagi merayu kepada Mahkamah Persekutuan]

[Rayuan daripada Mahkamah Tinggi Malaya, Johor Bahru; [1995] 2 CLJ 96]

Legislation referred to:
Evidence Act, 1950, ss. 92, 101, 102, 103, 114(g)

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Wan Mansor Wan Mahmood (Ahmad Jalaluddin Mohd Ariffin with him); M/s. Roslani & A.J. Ariffin

JUDGMENT

Siti Norma Yaakob JCA:

The present proceedings stem from a civil suit initiated by the appellant against the respondent and the trial of the suit is a test case for 116 other cases brought by various persons who share similar claims like the appellant against the same respondent.

The appellant is the occupier of premises built by the respondent on a piece of land known as Lot PTD 7244, in the Mukim of Johor Bahru, District of Johor Bahru, State of Johor, covering an area of about 79 acres. The land

originally belonged to the State Government of Johor but has since been alienated to the respondent (the investment arm of the Government) who developed it into a housing estate known as Tampoi Housing Estate and built 999 units of low cost houses and rented them out to displaced persons like the appellant.

The terms and conditions of the appellant's tenancy are governed by a tenancy agreement dated 6 September 1977 and for the purpose of this appeal, clauses 1, 2(1), 4(3a) and (b) are most pertinent. They set out:

(1) the period of the tenancy to be three years effective from 1 August 1977 to 31 July 1980;

(2) the monthly rental to be RM55.50;

(3) the option to be granted to the appellant to purchase the premises at the expiry of the tenancy at a price to be determined by the respondent and provided that the appellant had not committed, any breach of his obligations under the agreement;

(4) that such option may be exercised by the appellant giving written notice of his intention to purchase the premises not less than three months before the expiry of the tenancy; and

(5) that in the event the option is exercised, the total rental paid and the deposit made shall be calculated and treated as part payment towards the purchase price.

The appellant exercised his option to purchase the premises by his letter dated 22 June 1980 and although it was made out of time, the respondent waived the breach by offering to sell the premises to the appellant for a sum of RM14,000. The offer and other conditions attached to the offer are contained in the respondent's letter dated 12 October 1981, which also gave the respondent 14 days from the receipt of the letter within which to accept the offer. The appellant did not accept the offer as he considered the purchase price to be unreasonable and excessive, particularly when the respondent had already represented to him at a meeting held three years earlier on 26 September 1978, that the premises would be sold to him at the price of between RM7,000 - RM8,000. When attempts at negotiating for the price failed, the respondent by its letter dated 19 November 1981 withdrew its offer for non-acceptance. By letter dated 31 December 1985 the respondent gave notice to the appellant to vacate the premises by 31 January 1986. When the appellant failed to comply, a second notice dated 29 July 1986 was issued by the respondent's solicitors giving the appellant time until 31 August 1986 to quit and deliver vacant possession of the premises. He has to date not done so.

In proceedings filed against the respondent in March 1986, the appellant claims *inter alia* for:

(1) a declaration that he is entitled to purchase and the respondent is obligated to sell the premises to him;

(Interestingly this prayer does not specify the purchase price, the very crux of the dispute between the parties).

(2) specific performance of the tenancy agreement;

(3) damages in addition to or *in lieu* of specific performance; and

(4) an injunction restraining the respondent from evicting him from the premises.

Whilst denying liability to the appellant's claims, the respondent has also counterclaimed principally for arrears of rental from August 1985 to January 1986, vacant possession of the premises and mesne profits at RM110 per month from February 1986 to date of vacant possession.

In the Court below, the trial Judge, *inter alia*, dismissed the appellants claim with costs, and in allowing the respondent's counterclaim entered judgment against the appellant for RM721.50 being arrears of rental and mesne profits at RM110 per month calculated from 1 February 1986 till date of vacant possession and interest at 8% per annum. It is to appeal against this decision that the parties are now before us.

At the trial, the appellant called one other witness besides himself. He was however unable to serve the subpoena on his second witness despite various adjournments granted by the Court below to enable him to do so. It was the unavailability of this witness that created a number of issues before us.

That witness was to be Tan Sri Dato Hj. Basir bin Ismail who is alleged by the appellant to have represented to him and the other tenants that met him at a meeting held on 26 September 1978 that the premises would be offered to the appellant at the purchase price of between RM7,000 - RM8,000. At that material time Tan Sri Basir was a director of the respondent and it is the appellant's contention that the oral representation made by Tan Sri Basir had the effect of varying clause 4(3a) of the tenancy agreement and that the respondent is contractually bound to sell the premises to him at the purchase price of between RM7,000 - RM8,000 and not at RM14,000 as was offered to him.

The respondent has not disputed that a dialogue session was indeed held with the tenants on 26 September 1978 when Tan Sri Basir was present, together with other officers of the respondent and a Member of the State Legislative Assembly for that area, Tuan Haji Ali bin Othman, the appellant's witness, PW2.

Before us four issues were raised:

(1) Whether Tan Sri Basir made the representation;

(2) If so whether the burden shifts to the respondent when the appellant failed to serve the subpoena on Tan Sri Basir;

(3) Whether an adverse inference under s. 114(g) of the Evidence Act, 1950 can be invoked against the respondent; and

(4) Whether the counterclaim has been proven against the appellant.

As to the first issue, the trial Judge held that there is no evidence to show that Tan Sri Basir made any oral representation as to the purchase price of the premises. At the very most, the absent witness merely stated that he would discuss the matter with the other members of the board of the respondent. As this is a finding of fact, we are loathe to disturb the finding of the trial Judge. In any event a perusal of the notes of evidence confirms that finding to have been correctly made.

In his examination-in-chief, the appellant testified as follows:

> At this meeting it was agreed that State Economic Development Corporation would sell the house at a purchase price of between RM7,500 and RM8,000. There was a firm agreement reached between the parties at the meeting.

Later when he was cross-examined, his testimony sounded like this:

> When we went to the meeting, our group had arrived at a price of RM7,000 to RM8,000 in order to purchase the house. The tenancy agreement has mentioned that the price to purchase the house is between RM7,000 and RM8,000.

When he was referred to the clause 4(3a) of the agreement he admitted that:

> the agreement does not mention the figures of RM7,000 to RM8,000. All this while I was under the impression that the State Economic Development Corporation intended to sell the houses between RM7,000 to RM8,000. At the meeting on 26 September 1978, the figures of RM7,000 to RM8,000 were put by our representative to Tan Sri Dato' Haji Basir. On hearing our proposals, Tan Sri Dato' Haji Basir stated that he would have to discuss the matter with the State Economic Development Corporation before an offer is made in writing.

PW2, who was also present at the dialogue session confirmed this evidence when he was recalled by the appellant to testify as to what had transpired during the dialogue and his evidence appears as follows:

> The purpose of the meeting was to know whether SEDC wanted to sell the houses to the residents. Tan Sri Basir told the residents that the houses would be sold to all of them including the plaintiff. I did not hear anything about the price at which the houses were to be sold to the residents. I did not hear about a specific figure but there was a discussion about the price.

From the appellant's oral testimony and that of his witness PW2, there is no evidence to conclude that Tan Sri Basir made any oral representation to the appellant that the premises would be sold to him at the price of between RM7,000 to RM8,000. We therefore confirm the trial Judge's finding on this. It also stands to reason that as a director of the respondent, it would not have been right and proper for Tan Sri Basir to make a commitment on the purchase price of the premises but that the matter be brought before the full board of the respondent.

The allegation of the oral representation has been pleaded by the appellant at para. 8 of his statement of claim, and denied by the respondent at para. 5(a) of its amended statement of defence.

He who alleges must prove such allegation and the onus is on the appellant to do so. See s. 103 of the Evidence Act, 1950. Thus it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered as firstly the respondent never raised such an allegation and secondly has denied even making one. For this very reason the adverse inference under s. 114(g) of the Evidence Act, 1950 relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s. 114(g) is invoked against the appellant.

As for the counterclaim there is the contemporaneous evidence in the second notice of eviction dated 29 July 1986 and that the appellant had failed to deliver vacant possession of the premises to this day and as such his continued occupation of the premises without payment of any rent is that of a trespasser. The respondent's senior manager, DW2 had testified to this. Added to this is the clear and unequivocal admission by the appellant that he has not been paying the rental of the premises since July 1985. On this unrebutted evidence, there is no justification to disturb the finding of the trial Judge that the counterclaim has been proven against the appellant.

On the facts and circumstances of this case, we had dismissed the appeal with costs, affirmed the decision of the trial Judge and ordered the deposit to be paid to the respondent to account of its taxed costs. Upon the application of the appellant we had also ordered a stay of our judgment pending an application for leave to appeal to the Federal Court.

Abdul Malek Ahmad JCA:

We heard this appeal on 24 April 1996 and, after dismissing it on the same day, had indicated to the parties that we would give our reasons for doing so as this decision affects 116 other similar cases. We now do so.

The appellant is apparently unhappy because he has not been able to buy over the low cost house in Tampoi Housing Estate namely house No. 38D, Lot No. PTD 7244, Mukim of Johor Bahru (hereinafter "the premises") which he had rented for RM55.50 per month since 1 August 1977 despite exercising his option to do so at the end of his three-year tenancy.

Under the relevant tenancy agreement, he was entitled to exercise this option provided that he had not committed any breach of his obligations under the agreement and provided that the written notice of his intention to purchase was given not less than three months before the expiry of the tenancy or its renewal. The purchase price, however, was to be determined by the respondent but the total rental and the deposit were to be treated as part payment of the purchase price.

Although the appellant exercised his option to purchase out of time on 22 June 1980, the respondent offered to sell the premises to the appellant for RM14,000 by letter dated 12 October 1981. The appellant, however, rejected the offer on the basis that it was not in compliance with the promise made by the representative of the respondent who was present at the meeting on 26 September 1978 which was held for the purpose of discussing the option when the price was quoted as being between RM7,000 and RM8,000.

Consequently, on 19 November 1981, the respondent withdrew their offer of sale. On 31 December 1985, the respondent gave the appellant one month's notice to vacate the premises. A second notice to quit was given on 29 July 1986. The appellant has yet to give up possession to this day and the respondent had counterclaimed for vacant possession, rental arrears and mesne profits. The appellant's claim in the Court below is for a declaration that he is entitled to purchase and the respondent is obligated to sell the premises although the price had not been stated in the application, specific performance of the tenancy agreement, damages in addition to or *in lieu* of specific performance, and an injunction restraining the respondent from evicting him from the premises. The learned trial Judge had dismissed the claim with costs and had allowed the counterclaim with costs. Hence this appeal.

The main argument at the appeal stage was the failure of the appellant to call the representative of the respondent Tan Sri Dato' Basir Ismail (hereinafter "Tan Sri Basir") who was then a director of the respondent and who was purportedly the person who had promised on behalf of the respondent to sell the premises at between RM7,000 and RM8,000. Relying solely on that representation made by a respresentative of the respondent, the appellant

contends that the respondent was bound by it and should not have subsequently offered to sell the premises at the higher figure of RM14,000.

Having perused the notes of evidence, the grounds of judgment of the learned trial Judge and the submissions of learned Counsel for both parties, we were inclined to agree with the finding by the learned trial Judge that the relevant witness who was not called namely Tan Sri Basir had not made such a representation on the purchase price but had only promised to refer the matter to the respondent's board members before a firm offer could be made on the price.

Further to that, another of the appellant's witnesses, who is the local State Assemblyman and who was also present at the said meeting and who we would regard as being quite independent, had testified that he did not hear any specific figure for the price being mentioned although there was a discussion on it.

We also hold that it is the appellant, under the rules of evidence, who should call Tan Sri Basir to prove their point and not hope for the respondent to do so. Their difficulty and failure to do so does not mean that their burden shifts to the respondent who are in fact denying the allegation.

This can be seen from the number of adjournments allowed by the Court to enable the service of the subpoena on Tan Sri Basir to be effected by the appellant. It was the appellant, probably due to their difficulty to call Tan Sri Basir, who had recalled the local State Assemblyman at a subsequent hearing to prove their point but their plan obviously misfired. The appellant cannot now say that it is the respondent who should have called Tan Sri Basir and that s. 114(g) of the Evidence Act 1950 would apply against the respondent in these circumstances. In fact, in our view, that very provision should apply against the appellant for failing to call Tan Sri Basir.

Since the appellant's claim rests solely on this oral representation by Tan Sri Basir who did not give evidence, since his own independent witness the local State Assemblyman did not support this allegation, and since he had rejected the offer to buy at the higher price, the appellant's claim must surely fail. As regards the counterclaim, the appellant has admitted not paying the rental since July 1985 despite still occupying the premises and so there is no reason for us to interfere with the learned trial Judge's order allowing the counterclaim for arrears of rental from July 1985 to the date of vacant possession with costs and for interest at 8% per annum on the said sum.

Accordingly, the appeal is hereby dismissed with costs and the deposit is to be paid to the respondent to account for their taxed costs. Pending the application for leave to the Federal Court, we had also granted a stay despite strong objections from learned Counsel for the respondent.

Mokhtar Sidin JCA:

The appellant in this appeal is the plaintiff in the Court below. The plaintiff has on 3 March 1986 filed a claim against the defendant for a declaration that the plaintiff is entitled to purchase and the defendant is obligated to sell a piece of land comprising 1,200 sq. ft. described as No. 38-D Block 38 Lot PT(D) 7244 (hereinafter referred to as the said land). The plaintiff also prayed for specific performance of an agreement or in the alternative damages in addition or *in lieu* of specific performance.

The agreement appears to be a tenancy agreement dated 6 September 1977 which includes an option to purchase the said land on completion of a period of tenancy of three years. The defendant does not deny this but avers that the purchase by the plaintiff is to be based on an offer by the defendant. It is common ground between the parties that there was an offer dated 12 October 1981 by the defendant to the plaintiff to sell the said land for the sum of RM14,000. There were negotiations with the final result the plaintiff refused the offer. The ground for the refusal was that the price of RM14,000 was unreasonable and excessive and this was denied by the defendant.

It was contended by the plaintiff that the defendant through one Tan Sri Dato' Haji Bashir had made an offer to sell the said land to the plaintiff at the price of RM7,000 to RM8,000. This was denied by the defendant and gave two reasons for doing so. Firstly, no such offer was ever made by Tan Sri Dato' Haji Bashir and secondly, even if there is such an offer by him he could not do so on his own without the authority of the Board of the defendant.

In this respect it is clear to us that sometime on 26 September 1978 the plaintiff attended a dialogue between the tenants of the flat and Tan Sri Dato' Haji Bashir. This dialogue took place on the initiative of Haji Ali bin Osman (PW2) who was the Wakil Rakyat. It was alleged by the plaintiff that Tan Sri Dato' Haji Bashir, as the chairman of the defendant made the offer to sell at the price between RM7,000 to RM8,000. The defendant denied that Tan Sri Dato' Haji Bashir was the chairman of the defendant and stated that at that time the chairman of the defendant was the Menteri Besar. It is clear from the evidence that the defendant is a statutory corporation established by the government of the State of Johor by virtue of Enakmen Perbadanan Kemajuan Ekonomi Negeri Johor (PKENJ) Bil. (4) of 1968. This Enakmen came into force on 28 May 1968. At that material time under the Enakmen the chairman of the defendant was the Menteri Besar of Johor. It appears to us that the thrust of the contention of the plaintiff is that since Tan Sri Dato' Haji Bashir was the chairman of the defendant and as such he has the authority to make the offer. In view of the fact that Tan Sri Dato' Haji Bashir was not the chairman, we are of the opinion that the contention advanced by the plaintiff fails. We believe that disposes the second issue.

The other issue before us, was there such an offer. It is clear that it was the plaintiff who asserts that Tan Sri Dato' Haji Bashir who made the offer, the onus is on the plaintiff to satisfy the Court that such an offer was ever made. This is clearly provided for by ss. 101 and 103 of the Evidence Act 1950. The sections read as follows:

101. **Burden of Proof**

(1) whoever desires any Court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that these facts exist;

(2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

103. **Burden of Proof as to Particular fact**

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

It is clear from the above provisions on whom the onus lies. In the present case it is the plaintiff who had asserted that there exists a particular fact *viz.* that there was an offer to sell the said land at the price between RM7,000 to RM8,000. The onus is on the plaintiff to satisfy the Court there was such an offer.

From the notes of evidence it appears that the plaintiff gave evidence himself and he called another witness (PW2) to support his evidence. From the notes of evidence it is clear the evidence of the plaintiff in respect of the price was not supported by PW2. PW2 gave evidence that there was a dialogue between Tan Sri Dato' Haji Bashir, several officers of the defendant and the tenants of the flat including the plaintiff which took place on 26 September 1978. There were discussions of the sale of the units to the various tenants but PW2 categorically stated that no price was ever mentioned. The offer to sell was not denied by the defendant and the defendant went on to make the offer to sell in writing of the various units to the tenants at the price of RM14,000. As far as we could see on the evidence there was an offer for sale at the price of RM14,000 to the plaintiff. In the absence of any other evidence we could not infer otherwise *viz.* that the price was other than RM14,000 as suggested by the Counsel for the plaintiff. The onus is on the plaintiff to show satisfy us that there was another offer different from the offer in writing which as contended by the plaintiff the price between RM7,000 to RM8,000. We believe the plaintiff could do so under s. 92 of the Evidence Act. The onus is on the plaintiff to show that another price had been agreed upon.

It should be noted that the only issue is the price and not the sale. The only other person who could support the evidence of the plaintiff is Tan Sri Dato' Haji Bashir. The plaintiff was given every opportunity to call him to give evidence. From the notes, hearing was adjourned several times to enable the plaintiff to subpoena Tan Sri Dato' Haji Bashir. At the end of the day the plaintiff elected not to call Tan Sri Dato' Haji Bashir. The end result is that the evidence of the plaintiff of the price was contradicted by his own witness (PW2). Plaintiff's evidence that the offer price was RM7,000 to RM8,000 is a bare statement of the plaintiff without any proof.

The law in respect on whom the onus of burden of proof is in s. 102 of the Evidence Act which states:

> 102. **On whom burden of proof lies**
>
> The burden of proof in a suit or proceeding lies on that person which would fail if no evidence at all were given on either side.

Thus when the plaintiff failed to produce Tan Sri Dato' Haji Bashir to give evidence in support the plaintiff has failed to discharge the burden on him to satisfy the Court that there was already an agreement to sell the said land at the price of RM7,000 to RM8,000.

In the present case there exists certain facts which favour the defendant. In his judgment the learned trial Judge stated as follows:

> The plaintiff did at some stage in his evidence under cross-examination state, that at the meeting on 26 September 1978, the proposed figures of RM7,000 to RM8,000 as purchase price of the premises, were put to Tan Sri Dato' Haji Bashir and the said Tan Sri Dato' Haji Bashir had said that he would discuss the matter with the State Economic Development Corporation, before any offer is made in writing to the plaintiff.

From this it is clear to us that there was no offer by Tan Sri Dato' Haji Bashir to sell at the price as stated by the plaintiff. Our reading of the above caption is that the figure of RM7,000 to RM8,000 was only an offer by the plaintiff to buy the said property which was never accepted by Tan Sri Dato' Haji Bashir purportedly to be representing the defendant. The only evidence is that Tan Sri Dato' Haji Bashir said he would discuss the offer with the defendant. This offer was never accepted by the defendant because of the letter of offer by the defendant clearly states that the price was RM14,000.

As such we are of the opinion that the plaintiff failed to prove there exists a contract between him and the defendant for the sale of the said land at the price of RM7,000 to RM8,000. That in our view is sufficient to dispose off the appeal.

In view of the submission of the learned Counsel for the appellant that, the learned trial Judge had wrongly applied s. 114(g) of the Evidence Act, we have gone through the learned Judge's judgment and we are in entire agreement with the learned Judge when he said that:

> There is no justification whatsoever for drawing such an adverse inference under s. 114(g) of the Evidence Act.

Counsel for the plaintiff had invited the learned trial Judge to draw the adverse inference against the defendant, for not calling Tan Sri Dato' Haji Bashir as their witness. It is to be noted from the pleadings and the notes of evidence that it was the plaintiff who had asserted that Tan Sri Dato' Haji Bashir was the one who had made the offer. This was denied by the defendant throughout. As such it is not in the interest of the defendant to call him. It is the defendant's case throughout that there was no offer by Tan Sri Dato' Haji Bashir and this has been supported by the evidence. In view of that we are of the opinion that the learned Judge had applied the law correctly.

For the above reasons we have no reason to disturb his decision. The appeal is hereby dismissed with costs. The order of the learned Judge is affirmed. Deposit to be paid to the respondent towards costs to be taxed.

Reported by Isaac TJ Lee